STATE OF MICHIGAN

COURT OF APPEALS

CHARLES EDWARD MARTIN, Plaintiff/Counter Defendant-Appellee,	UNPUBLISHED January 24, 2006
v	No. 257893 Oakland Circuit Court
PATRICIA ANNETTE MARTIN, Defendant/Counter Plaintiff-Appellant.	LC No. 2001-655432-DO

Before: Cavanagh, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment of divorce. We reverse and remand for a new trial.

The parties litigated their divorce dispute in a four-day bench trial before Judge Patrick J. Brennan. After the close of proofs, but before any findings of fact or conclusions of law were made, Judge Brennan died. The case was thereafter reassigned to Judge Daniel P. O'Brien, and then ultimately to Judge Joan E. Young, who decided the matter on the basis of the record established before Judge Brennan and entered the judgment of divorce. In rendering her decision, Judge Young stated that she "reviewed the trial transcripts and the testimony of the witnesses and reviewed all of the evidence admitted in this matter." After defendant filed this appeal and requested the necessary transcripts, she discovered that the tapes from the proceeding on the morning of July 22, 2002, were missing and, thus, no transcript of that morning proceeding was available. The missing transcript included defendant's adverse witness testimony on examination by plaintiff's attorney.[1]

The pivotal question in this appeal is whether Judge Young could properly decide this case on the basis of the record established before Judge Brennan without the express consent of the parties. Defendant argues that MCR 2.630 did not permit Judge Young to decide this case. This court rule provides:

[1] The parties did not offer a settled record of what testimony was presented during the morning session. It appears from the record that defendant testified about her age, employment history, and circumstances surrounding the receipt of her pension and social security disability benefits.

> If, after a verdict is returned or findings of fact and conclusions of law are filed, the judge before whom an action has been tried is unable to perform the duties prescribed by these rules because of death, illness, or other disability, another judge regularly sitting in or assigned to the court in which the action was tried may perform those duties. However, if the substitute judge is not satisfied that he or she can do so, the substitute judge may grant a new trial.

Court rules are interpreted in the same manner as statutes. If the language of a court rule is clear, then it must be enforced as written. *In re KH*, 469 Mich 621, 628; 677 NW2d 800 (2004). By its clear terms, MCR 2.630 only addresses a disability that occurs "after a verdict is returned or findings of fact and conclusions of law are filed." Because no verdict was returned and Judge Brennan did not file any findings of fact or conclusions of law before he died, MCR 2.630 is not applicable to this case.

In *People v McCline*, 442 Mich 127; 499 NW2d 341 (1993), our Supreme Court addressed a case involving the substitution of a judge before a verdict was rendered. In that case, the substitution was made after jury voir dire, but before opening statements. *Id*. at 128. The Court quoted with approval the following analysis from *State v Johnson*, 55 Wash 2d 594, 596; 349 P2d 227 (1960):

> The second assignment of error presents a new question in this jurisdiction. The general rule, as stated by the appellant in his brief, is that a judge may not be substituted to preside over the remainder of a trial after evidence has been adduced before the original judge. The leading case is *Commonwealth v Thompson*, 328 Pa 27; 195 A 115 [1937]; 114 ALR 432.
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> As a rule, a judge cannot finish the performance of a duty already entered upon by his predecessor where that duty involves the exercise of judgment and the application of legal knowledge to, and judicial deliberation of, facts known only to the predecessor. *Durden v People*, 192 Ill 493; 61 NE 317 (1901); *Commonwealth v Thompson*, *supra*; 30 Am Jur 25, § 39.
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> It immediately is apparent that the substitution of a judge after the jury has been sworn but before any evidence has been taken, does not involve this objection. As was said in *Commonwealth v Thompson*, *supra*, the examination of jurors under voir dire does not elicit any information that can be used in the trial of the case. Such examination is merely for the purpose of securing a competent, fair, and unprejudiced jury. That function can be performed properly by any judge, but after a jury is selected and sworn, a different situation arises. [*McCline*, *supra* at 133.]

The Court in *McCline* held that in light of Michigan's harmless error rule, reversal was not required unless actual prejudice could be shown. *Id*. at 134. The Court concluded that "[b]ecause the substitution in this case took place before opening argument or the introduction of any testimony, and because the defendant has demonstrated no prejudice," the defendant was not entitled to a new trial. *Id*.

Although *McCline* involved a criminal trial, the decision has been applied to civil cases. In *Brown v Swartz Creek Mem Post 3720-Veterans of Foreign Wars, Inc*, 214 Mich App 15, 18; 542 NW2d 588 (1995), the case was reassigned before the trial began. Relying on *McCline*, this Court held that the trial court did not abuse its discretion by denying the defendant's motion for a mistrial because it had not shown actual prejudice. *Id*. at 21.

These cases indicate that where a judge is substituted before evidence is received, a party is not entitled to a new trial due to the substitution unless he can show actual prejudice. But *McCline* and *Brown* both involved situations where the judge was substituted before any evidence was received and the issue was preserved. In *Christopher v Nelson*, 50 Mich App 710; 213 NW2d 867 (1973), this Court addressed a situation more analogous to this case. After a bench trial, but before a decision was issued or any findings of fact or conclusions of law were made, the presiding judge died. *Id*. at 711. The plaintiff did not attack the successor judge's authority to decide the case, but rather argued that because the successor judge decided the case based on a cold record, appellate review should be de novo. *Id*. This Court rejected the plaintiff's argument and held that because the parties stipulated to allowing the successor judge to decide the case on the basis of the record established before the original judge, review of the successor judge's findings of fact was for clear error, just as if the original judge had made them. *Id*. at 712. This Court noted the general rule that "[t]he death of the judge who heard the case *before* his decision is made or his findings of fact and conclusions of law are filed results in an incomplete proceeding. It is in legal effect a mistrial. A new trial upon application to the successor judge is a matter of right." *Id*. at 711-712 (emphasis in original). But the Court further observed that "[t]his holding, of course, does not prevent the parties from . . . consenting to the adjudication by the successor judge." *Id*. at 712.

In this case, however, the parties did not expressly consent to Judge Young's deciding this matter on the basis of the proofs presented to Judge Brennan. In *Dillon v Dillon*, 134 Mich App 423; 350 NW2d 892 (1984), the trial judge granted the parties a divorce, but did not enter the judgment. He also decided and entered the property disposition. Before the judgment was entered, the trial judge retired. The successor judge entered the judgment and included the trial judge's disposition. *Id*. at 426. The defendant's motion for a new trial was denied. *Id*. This Court held that under former GCR 1963, 531, the predecessor to MCR 2.630, the successor judge had the authority to enter the judgment. *Id*. at 427. But it also held that because the original trial judge had not made specific findings of fact concerning the property disposition, the successor judge was without authority to enter it.

> The trial judge's statement in the property disposition order in no way indicates what testimony was believed, what facts had been proven in the trial judge's mind, or what the basis was for the trial judge's decision.
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> Although we are reluctant to order retrial of a case which has already consumed seven days in testimony, the absence of any factual findings and conclusions of law by the initial trial judge relative to the question of the property disposition makes such action necessary. [The successor judge] was without authority to resolve this issue. [*Id*. at 428.]

In light of the foregoing, we conclude that where a judge, after taking proofs at a bench trial but before issuing a decision or making findings of fact or conclusions of law, becomes

disabled and unable to act, a successor judge is without authority to decide the case on the basis of the proofs presented to the original judge, absent the parties' consent. Because the parties here did not expressly consent to Judge Young's deciding this case after Judge Brennan's death, it was error for Judge Young to render a decision in this case.

The question becomes whether prejudice may be presumed. This Court acknowledged in *Christopher*, *supra* at 711-712, that the legal effect of a judge's death after proofs have been presented is a mistrial. In *McCline*, *supra* at 134, our Supreme Court stated that "the great weight of authority favors the rule that substitution of a judge *before* opening argument or the admission of evidence is not an automatic ground for reversal." *Id*. at 132 (emphasis added). The error was deemed harmless in that case only because evidence had not yet been presented. Conversely, in this case, Judge Young's substitution occurred after all the proofs had been presented before Judge Brennan. We conclude that, in these circumstances, prejudice is presumed and a new trial is required.

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra
/s/ Jane E. Markey